

SENATE BILL REPORT

HB 2499

As Reported By Senate Committee On:
Judiciary, February 20, 2008

Title: An act relating to notice under the Washington business corporation act.

Brief Description: Addressing the materials required to accompany notice under the Washington business corporation act.

Sponsors: Representatives Pedersen and Rodne.

Brief History: Passed House: 2/01/08, 95-0.

Committee Activity: Judiciary: 2/20/08 [DP].

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass.

Signed by Senators Kline, Chair; Tom, Vice Chair; McCaslin, Ranking Minority Member; Carrell, Hargrove, McDermott, Roach and Weinstein.

Staff: Robert Kay (786-7405)

Background: State Notice Rules. The Washington Business Corporation Act (WBCA) authorizes various methods by which required notices and accompanying materials may be delivered to shareholders and directors, and identifies when such notices are effective, depending on the method used.

Except in the case of a meeting of the board of directors, which may be communicated orally, notice to shareholders and directors and accompanying materials must be provided in the form of a "record," meaning that information must be inscribed on a tangible medium or contained in an electronic transmission.

In certain circumstances, the WBCA requires additional materials to accompany a notice to directors or shareholders:

- a copy of any proposed amendment must accompany a notice of a meeting to address an amendment to the articles of incorporation;
- a copy or summary of the proposed plan of merger or share exchange must accompany a notice of a meeting to address a merger or share exchange;
- a description of the proposed transaction must accompany a notice of a meeting to address a sale of all or substantially all of the corporation's assets outside the regular course of business;

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- a copy of RCW Chapter 23B.13, dealing with dissenters' rights, must accompany a notice of a meeting to address a matter giving rise to dissenters' rights.

For an electronic transmission of either notice and accompanying materials to be effective, shareholders and directors must first give affirmative consent to receive electronic notifications, and provide the location to which electronic notices may be transmitted. For those who consent, notices and accompanying materials may be provided by: (1) posting on an electronic network; and (2) delivering to the shareholder or director a separate record of the posting which includes comprehensive instructions to obtain access to the posting on the electronic network.

Companies with a large or frequently changing shareholder base may encounter difficulty in obtaining consent for electronic transmission of information from each shareholder. As a result, these companies typically rely on physical delivery methods to provide notice and required additional materials to shareholders.

Until the recent creation by the federal Securities and Exchange Commission (SEC) of so-called "e-proxy" rules, public companies commonly delivered via mail physical copies of proxy statements required by SEC regulation, along with physical copies of the meeting notices to shareholders and additional materials described above and required under state law.

Federal "E-proxy" Rules. In July of 2007, the SEC adopted mandatory "e-proxy" rules defining the manner in which proxy materials for securities registered under Section 12 of the Securities Exchange Act of 1934 must be provided to shareholders. By one recent estimate, the average cost to a company to print and mail a paper copy of proxy materials was \$5.64. According to the SEC's rule summary, the e-proxy amendments are intended to enhance the ability of investors to make informed voting decisions, and to expand use of the Internet to lower the cost of proxy solicitation.

Under the new rules, effective January 1, 2008, for "large accelerated filers" and January 1, 2009, for all other filers, a company may choose to provide proxy materials to shareholders according to the "notice only" or "full set delivery" options. Both options require companies to post proxy materials on a publicly accessible website, and to provide paper or email copies of the posted material upon shareholder request.

Full set delivery. The "full set delivery" contains the basic requirement under the e-proxy rules that the company post the proxy materials on an Internet website and send paper notice that the proxy materials are available on the website, but also allows a company, should it choose, to continue the traditional method of delivering paper copies of proxy materials to shareholders.

Notice only. The "notice only" option a company, should it choose, to discontinue the traditional method of delivering paper copies of proxy materials to shareholders. The company may simply post the proxy materials on an Internet website and send paper notice that the proxy materials are available on the website.

The content of the notice of Internet availability required under both options is strictly limited to the information allowed in the e-proxy rules, except that the notice may be incorporated or combined with a meeting notice required under state law.

Implications for Washington Companies. A Washington public company choosing the "notice only" option for delivery of proxy materials may continue the traditional practice of sending on paper the meeting notice required under state law and may now combine the meeting notice with the paper notice, required under federal law, of the availability of the proxy material on the Internet. However, for those shareholders who have not consented under the WBCA to electronic transmission of meeting notices and any accompanying meeting materials required under state law, paper mailing of any additional meeting materials is required. While public companies can fulfill federal requirements regarding delivery of proxy materials for a shareholder meeting by posting them on the Internet, the company must, under state law, deliver paper copies of other materials associated with the shareholder meeting. If the requirement for consent by the shareholder to electronic transmission of the additional materials were removed, a Washington public company would be able to send a paper notice combining the meeting notice with notices that proxy and additional meeting materials are available on the Internet.

Summary of Bill: A public company may satisfy its requirement under the Washington Business Corporation Act to all shareholders to deliver additional materials with a meeting notice for certain types of shareholder meetings by posting the additional meeting materials on an Internet website and sending a paper notice to the shareholder of the availability of the additional materials on the Internet. The requirement, in the WBCA, that a shareholder must consent to electronic transmission of a notice of the shareholder meeting itself is not changed; however, an implied requirement that the shareholder consent also to electronic transmission of additional required meeting materials is removed.

A public company electing to post required additional materials on the Internet must provide a copy of the additional materials in a tangible medium to any shareholder entitled to such notice who makes a request.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This bill applies only to publicly held corporations organized under the Washington Business Corporations Act, RCW Title 23B. The motivation in the background for this bill is the health of the environment. This bill will enable corporations to reduce their use of paper significantly. This bill will not have an effect on shareholders' receipt of a paper notice in the mail of shareholders meetings, but will allow corporations to put on the corporation's website additional materials that they are required to send to shareholders in advance of certain meetings. Often these additional materials can run in the hundreds of pages per shareholder. Thus, this bill will cause a large reduction of paper usage. This bill harmonizes the state law regarding transmission of additional materials required to be sent for certain shareholder meetings with the federal SEC regulations allowing

proxy materials to be posted on a corporation's website with a paper notice to the shareholder regarding the location of the website. Passage of this bill into law will allow public Washington corporations to put all materials regarding a shareholder meeting on the corporation's website, and will reduce the paper mailing to a combined notice of the meeting itself, that the additional meeting materials, including the proxy materials, are posted on the corporation's website, the address of the website, and instructions on how to access the website on a computer. If a shareholder wants the additional materials in paper form, this bill, along with the new SEC regulations, requires that all the additional meeting materials be sent to the requesting shareholder.

Persons Testifying: PRO: Representative Jamie Pedersen, prime sponsor; Kent Carlson, Washington State Bar Association.